No. 87-578

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IN THE

Supreme Court of the United States

October Term, 1987

THE BANK OF NOVA SCOTIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER THE BANK OF NOVA SCOTIA

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REPLY BRIEF FOR PETITIONER THE BANK OF NOVA SCOTIA

Introduction

The district court found that the prosecutors' misconduct before the grand jury was purposeful and pervasive, was motivated by a resolve to prejudice the defendants, and undermined the integrity of the grand jury system.[1] These findings are not disputed by the government. Instead, in its brief, the government urges this Court to condone a standard which in effect leaves the grand jury to the unsupervised discretion of prosecutors, and eliminates the authority of district courts to remedy and prevent abusive misconduct before a grand jury.

The government further proposes that appellate courts be permitted to undertake *de novo* review of a district court's factual determinations of prejudice. Such an approach is inconsistent with this Court's clear dictates concerning the appropriate scope of appellate review, and allows an appellate court impermissibly to ignore, as the majority of the Tenth Circuit did here, the district court's evaluation of credibility and demeanor, and to substitute its own inferences for that of the trier of fact.

POINT I

A District Court Which Finds Willful, Repeated, And Pervasive Misconduct By Government Attorneys Before The Grand Jury May Dismiss An Indictment Prior To Trial In Order To Protect The Integrity Of The Grand Jury Process.

The government meticulously avoids addressing the principle question presented by the petition: whether pursuant to its supervisory power a district court may dismiss an indictment *prior to trial* to protect the integrity of the grand jury process from willful, repeated and pervasive misconduct. Instead, relying exclusively on decisions of this Court that address the standard for post-conviction relief, and ignoring the policies that underlie those decisions, the government argues that regardless of the nature of the misconduct, and the time of its adjudication, prejudice must be demonstrated before a district court can ever dismiss an

[1] Citations to the Appendix to the Petition of The Bank of Nova Scotia are denoted by an upper case letter followed by the page number ("A___").

indictment. When applied to the facts of this case, however, this Court's decisions clearly support the determination by the district court that dismissal is required to preserve the integrity of the grand jury system.

United States v. *Mechanik*, 475 U.S. 66 (1986), and *United States* v. *Hasting*, 461 U.S. 499 (1983), both involved reversals of convictions after trial. This Court emphasized in those cases that the societal costs of the trial weighed heavily in support of a standard requiring demonstration of prejudice before a conviction is overturned. [2] The public interest in a case such as this, however, where intentional and pervasive misconduct is discovered and adjudicated before trial, requires a different standard.

In *Hasting* this Court noted that the purposes underlying the exercise of supervisory power had to yield to the societal costs of a trial and the trauma to victims who had testified at the trial. Those considerations are not present here where no trial has taken place and where the exercise of the court's supervisory power will not foreclose a trial in the event that the grand jury votes an untainted indictment. Thus, there is little to weigh against the remedial and deterrent purposes underlying the exercise of a district court's supervisory powers. Also, unlike the situation in *Mechanik*, there has been no petit jury verdict that moots the importance of the probable cause determination of the grand jury.

Furthermore, this Court's holding in *Mechanik* virtually eliminates post-trial review of prosecutorial misconduct before the grand jury: "If the jury convicts, the motion is denied; if the jury acquits, the matter is mooted." *Mechanik*, 475 U.S. at 77 (O'Connor, J., concurring in judgment). Thus, in those instances when egregious misconduct is discovered and adjudicated prior to trial the remedial and deterrent purposes of a district court's supervisory powers are heightened. Therefore, it is critical that this Court set forth a clear precedent upholding, in such in-

[2] The government suggests in its brief that the *Mechanik* court, in dealing with a "technical" error, implied that prejudice would also be required if a matter was addressed before a trial. There is no such holding in *Mechanik*. Indeed, the court in *Mechanik* did not even speak to the supervisory power of a district court and did not attempt to establish a standard for pretrial determinations in the *dicta* cited by the government.

stances, a district court's exercise of supervisory powers in order to protect the integrity of the grand jury process.

This Court has long recognized that the grand jury's primary and, indeed, constitutional purpose is to stand between the citizens and over-zealous prosecutors such as those that presented this case. Because of practical considerations, the grand jurors take much of their direction from prosecutors who, during the secret, *ex parte* proceedings, are permitted unparalleled discretion in the manner of their presentations, are vested with broad investigative tools, and are benefited by relaxed evidentiary standards. Therefore, once intentional and pervasive misconduct undermining the integrity of the grand jury is discovered and adjudicated before trial, a district court must be free to dismiss the indictment pursuant to its supervisory powers.

Unlike a trial where a judge's presence and the public's scrutiny help insure fair conduct, during their grand jury presentations, prosecutors are shielded from review. Thus, no judicial officer is present during the presentation to impartially evaluate the impact of purposeful misconduct on the grand jurors. Because little if any meaningful evaluation of the effect of purposeful misconduct can be judged merely from a review of the cold record, [3] prejudice must be assumed from intentional violation of the rules established to insure an unbiased grand jury. In sum, given the secrecy and informality of grand jury proceedings, the imposition of the almost insurmountable burden to demonstrate prejudice would render the grand jury a lawless body.[4]

[3] The government argues, ironically in this case, that transcripts of the grand jury proceedings are sufficient to evaluate the impact of misconduct on the grand jurors. Here, however, not only did the prosecutors, in an attempt to suppress those transcripts, repeatedly violate court orders (*Kilpatrick II* at C2-C3), but among the pervasive acts of misconduct found in this case were the repeated unrecorded violations of Rule 6(d) by numerous illegal tandem appearances of government agents before the grand jury. *Kilpatrick II* at C7-C8.

[4] Indeed, the standard suggested by the government would impose an even greater burden than this Court found reasonable in at least two *post-conviction* decisions, *Young* v. *United States*, 107 S. Ct. 2124 (1987); and *United States* v. *Morrison*, 449 U.S. 361 (1981). In those decisions, this Court held that the "substantial threat" of prejudice was sufficient to overturn a conviction. *United States* v. *Morrison*, 449 U.S. at 365.

Finally, the government acknowledges that a split exists in the circuits concerning the need to demonstrate prejudice before a court may order dismissal pursuant to its supervisory power. The government argues, however, that in light of *Hasting* the split appears to be eroding. This claim lacks merit. To support its argument the government relies upon the Third Circuit's opinion in *United States* v. *Martino*, 825 F.2d 754 (3d Cir. 1987). *Martino*, however, held only that procuring the issuance to an undercover agent of a fictitious grand jury subpoena in connection with a sting operation did not constitute misconduct, and addressed the need for prejudice only in *dicta*. *Id.* at 760, 762. Furthermore, in *United States* v. *Rosenfield*, 780 F.2d 10 (3d Cir. 1985), also a post-*Hasting* decision, another panel of the Third Circuit held that dismissal is appropriate (though the court declined to do so on the facts of that case) not only where a defendant is prejudiced, but also to protect the integrity of the grand jury system and to deter future illegal conduct. *Id.* at 11. Moreover, even the government is constrained to concede that the Second Circuit has since *Hasting* reaffirmed its position that prejudice is not required when a court exercises its supervisory power. *See United States* v. *Hogan*, 712 F.2d 757 (2d Cir. 1983); *United States* v. *Bari*, 750 F.2d 1169 (2d Cir. 1984); *United States* v. *Dyman*, 739 F.2d 762 (2d Cir. 1984).

Furthermore, most of the courts that have addressed this issue since *Hasting* have done so in the context of post-trial adjudications. In stark contrast, when faced with the matter before trial, at least one court after *Hasting*, like the dissent below, has determined that prejudice is not required. *United States* v. *Omni International Corp.*, 634 F. Supp. 1414 (D. Md. 1986) (appeal to Fourth Circuit withdrawn by government). Therefore, to the extent that previous decisions of this Court have left to implication the very different balancing of considerations involved in the exercise of supervisory powers before trial as opposed to after conviction, the lower federal courts are in need of express guidance.

POINT II

A Federal Court Of Appeals May Not Conduct A *De Novo* Review And By Drawing Its Own Inferences Set Aside A District Court's Factual Determination That The Deliberate Misconduct By Government Attorneys Infringed The Grand Jury's Ability To Exercise Independent Judgment

Like the majority below, the government in its brief disregards the standard for appellate review established by this Court's recent decisions in *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985) and *Maine* v. *Taylor*, 477 U.S. 131 (1986). Without discussion, the government ignores facts, critical to the district court's findings, that demonstrate beyond peradventure that defendants, particularly the Bank and its employee Monte Smith, were severely prejudiced by the prosecutors' calculated abuse. Moreover, no cogent explanation is offered by the government why this Court should carve out an exception to the well-reasoned standard of review set forth in *Anderson* and *Maine* v. *Taylor*, so as to permit *de novo* review by an appellate court of a district court's factual determination of prejudice.

There is no dispute that in order to obtain the bank's indictment the prosecutors deliberately provided the grand jurors with misleading testimony concerning the Bank's familiarity with other defendants and the Bank's supposed role in the operation of those defendants' tax shelter enterprise. *See Kilpatrick II* at C25-C31. Rather, these district court findings are ignored by the government here and the majority below. See Dissent at A34 n.1.

In sum, the district court found that although the government's investigation covered almost two years, the Bank was not considered to be a target until the month before the indictment was returned. *Kilpatrick II* at C27. The presentation to the grand jurors of the case against the Bank consisted almost exclusively of a purported "summary" by an IRS Agent. *Id.* at C25. The supposed "summary", presented on the day before the indictment was returned, was not a summary at all. *Id.* at C25-C31. As the district court detailed in its opinion, the agent's testimony disguised to the grand jurors as a "summary of evidence" was false in several critical respects relating to the knowledge and intent of the Bank. Moreover, the summary was offered in order to persuade

the grand jurors, who had questioned the appropriateness of singling out the foreign Bank for prosecution.

An example of the inaccuracies uncovered by the district court is the startling assertion that Monte Smith, the manager of the Bank's Cayman Island branch, had visited the tax shelter promoters in Denver and, therefore, was familiar with their operation. The district court determined that this was untrue and that the government knew it was probably untrue. Further, the prosecutors knew that this allegation was necessary to convince the grand jurors to indict the Bank. *See United States* v. *Hogan*, 712 F.2d at, 760, 762 n.2.

The district court detailed this specific abuse and several others relating to the presentation of the case against the Bank in its extensive factual findings. The district court's findings as to the falsity of the purported "summaries", the reasons for the prosecutors' use of the "summaries", and the resultant harm to the Bank, were supported by a review of the transcript of the grand jury proceedings as well as by the testimony of government witnesses during the district court hearing. *See Kilpatrick II* at C25-C31.

Apparently because there is no doubt that this false testimony prejudiced the Bank, the majority below and the government here conspicuously avoid even referring to this blatantly harmful misconduct. Instead, they euphemistically assert that the use of summaries is "permissible and often helpful". [5] Gov't brief at 5; Majority at A21. Permitting the district court's finding of the falsity of this "evidence" to be ignored in this fashion makes a mockery of the grand jury process and the district courts' factfinding role. [6]

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[5] Neither the district court nor the defendant has ever suggested that summaries, if truthful, are impermissible.

[6] Other examples of factual findings ignored by the government and the majority of the Tenth Circuit include the district court's finding that informal grants of immunity were abused by threatening a witness with withdrawal if he testified favorably to a target, and that the prosecutors called witnesses to the grand jury solely to have them assert the Fifth Amendment and through further questioning to make it appear as though their silence was financed by targets. *See Kilpatrick II* at C22-C24, C46-C47. The government, as an afterthought, suggests that with respect to some "historical facts" the majority may have applied

This inept appellate factfinding highlights the error in the government's suggestion that the bias and prejudice of grand jurors is subject to *de novo* review in complete disregard of this Court's recent holding in *Anderson*. Bias and the intent to bias were the central issues addressed by the trier of fact in that case. *See also Pullman-Standard* v. *Swint*, 465 U.S. 273 (1982) (intent to discriminate not subject to *de novo* review). In *Anderson*, this Court made clear such findings could not be reviewed *de novo* by an appellate court. The government cites no reason why the district court's determination of prejudice here, which was based upon a detailed review of the entire grand jury transcript and an evaluation of the credibility and force of personalities of the prosecutors and other witnesses, should be excepted from this Court's recent pronouncement in *Anderson*.

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the "clearly erroneous" standard. However, the majority's explanation of its conclusion in that respect makes clear that it relates *solely* to its mistaken view that the seven witnesses were called *only* to assert their Fifth Amendment privilege. *Compare* Majority A26-A27 with *Kilpatrick II* at C24-C25.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit.

Dated: December 23, 1987.

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